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CRITICAL RACE PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

Learning from Anthropology

Realizing a Critical Race Approach to (International) Law

RICARDA RÖSCH — 19 February, 2018

Introduction

Despite anthropology's troublesome contribution to the colonial project, the discipline as it is today has much to offer to critical race theory (CRT) and postcolonial approaches to international law. Already in the 1930s, Franz Boas and his students began to challenge the Eurocentrism, modernism and colonialism of anthropology. They developed a critique of cultural evolutionism, according to which culture was understood as evolving towards the "Western ideal". Instead, they acknowledged cultural diversity and condemned colonialism.

While the Boasians' contribution to anthropology and particularly their cultural relativism has also attracted criticism, their work still constituted a turning point for anthropology: anthropology turned from a discipline entrenched in the colonial endeavour to a discipline, whose theories and methods can help to dismantle racial and other forms of biases in the social sciences, including law. Today, anthropology's potential contribution to counter-hegemonic projects is widely acknowledged for several reasons: its interdisciplinarity, its scepticism of unifying theories and its interest in the "local", the everyday, or the marginal. But what exactly can anthropology contribute to CRT in law?

Situating the law

Anthropology promotes a more holistic and situated understanding of law on at least two levels:

Firstly, anthropological enquiries may include norms that may not be seen as "law" by lawyers. Such a view challenges "legal centralism", which sees states as the only source of law. Instead, it recognises the *de facto* law-making function of a variety of different actors such as corporations, local customary authorities, the media and international NGOs. Critical Race Theory, amongst others, seeks to shift the focus of research from hegemonic to marginal perspectives. Hence, acknowledging that not only the state, but also a variety of groups within the state influence our understandings of the law, is an important step in the right direction.

Secondly, anthropology can contribute to the critical legal project by helping to situate the law. Anthropologists, unlike many lawyers, do not start from the assumption that the

law is objective and can be decoupled from other forms of social practice. Instead, law is understood as a mirror of the society with all its hegemonies and counter-hegemonic struggles. From an anthropological perspective, analysing the law means that also its space of origin, its practices and its relations to other forms of social practice should be taken into consideration.

This obviously contravenes the intuition of many international lawyers. Human rights in particular draw life from their claim to universality. Such an uncritical understanding of human rights tends to set human rights and Western states as the norm while it reduces the Third World to their non-compliance. Particularly, the Third World Approaches to International Law (TWAIL), which are characterized by strong overlap with CRT, criticise international law's claim to universality. It is considered to be problematic for several reasons: it ignores the colonial history of international law and contributes to discourses that confirm Western superiority and keep the Third World in the periphery of the transnational legal space. Besides that, it homogenizes the Third World and rejects its agency: it does not take into consideration the myriad of processes going on within the states of the Third World, particularly counter-hegemonic processes.

Moreover, the discourse of international law often suggests a legal hierarchy with international law at the top of the pyramid, followed by national and sometimes sub-national law. This devaluates not only national and local laws, it also does not grasp the reality of legal pluralism in an accurate way. Legal pluralism, which is the focus of many legal anthropologist enquiries, describes how different legal systems overlap and interact. Anthropologists examine "legal and law-like orders involved in international, transnational and global connections". Legal pluralism is, however, not seen as the result of a one-way process. Instead, both processes of globalization and "glocalization" are of interest to legal anthropologists. Glocalization describes how the "local" flows back to the "global". Acknowledging the complexity of such flows and their various directions allows for the examination of heterogeneity, particularity and emerging contradictions in different spaces. It enables us to question simplifying narratives of globalization and homogeneity and can make particularisms and non-hegemonic processes visible.

But legal analysis should not only be aware of such flows, but also to the consequences of such flows in specific spaces. Legal anthropology is based on the assumption that the understanding and implementation of norms depend heavily on the spatiotemporal context and its social practices. Trying to get a fuller picture of the living law, its historical, spatial and social embeddedness, can contribute a great deal to legal analysis by making hegemonies and counter-hegemonic processes visible. Theoretical concepts like legal pluralism invite us to look beyond the law of the books and to consider other social practices when contemplating the law.

"Other" knowledges of the law

Seeing the law as a social practice, which is a product of space, history and other social practices, allows also for unmasking formations of power both within the law and society as a whole. Examining law as a social practice includes exploring on the one hand its relationship to other social practices, and, on the other hand, its own nature and content. This includes the analysis of law's structures, the identities it creates and the underlying discourses that legitimize it.

Those structures, identities and discourses of social practices are reflective of social hierarchies within the spatiotemporal context. In most Western countries, for instance, it holds true that the majority of high ranking legal professionals continue to be white, non-

working class, non-migrant, heterosexual and male. Limiting the legal analysis to the "formal" law, and thereby privileging the perception of white, non-working class, non-migrant, heterosexual men, leads not only to a failure to see a full picture of law as a social practice, but also reinforces relations of power. While it is a first step in the right direction to acknowledge that the legal consciousness of the population matters, it is crucial to not stop there and to create further dichotomies and imbalances of power between the seemingly objective and knowledgeable legal professional and the "funny ideas" of ordinary people about the law. Hence, the Benda-Beckmanns make a very good point when they argue that one should not only discuss the legal consciousness of the population (or lack thereof), but also the situated legal consciousness of judges and other legal professionals (p.137-8).

Making use of anthropological methods

Looking at the law of the books is not enough for getting a full picture of the law and legal processes. In this regard, anthropological methods may be good tools for dismantling hierarchies within the law, as well as law's relationship to other social practices.

Anthropological methods are as diverse as they are in other disciplines. Despite anthropology's troublesome history, many anthropologists commit to a "humanist" or transformative research approach, stressing the subjectivity of the researcher and his*her research. Tools like "positionality" help to situate both the researcher and the field of research. The work of anthropologists contributes much to critical approaches to research and critical research methods.

Some anthropologists also challenge ideas like that of the "native informant" which also plays a crucial role in international law, for instance, as an expert before international courts or in international organizations. Especially discourse-centred anthropological approaches may help to situate the knowledge of such "indigenous experts" and provide meaningful insights for diversifying the voices to be included in research (p.418).

Conclusion

Many anthropologists and critical legal scholars have a similar world view and pursue similar goals. So, no matter if one advocates for a post-, trans- or interdisciplinary approach, law can certainly learn from anthropology. Legal science and practice can only get better when people are willing to look beyond the confined boundaries of their discipline. Acknowledging the situatedness of the law may help to overcome homogenizing and hegemonic social practices. Law and legal science could be greatly diversified by giving more space to "other", marginalized perspectives. This could happen, for instance, by using methods like participant observation, interviews or participatory action research to grasp the views of people other than legal professionals. But legal studies and research, as well as legal practice also need to become more accessible to non-privileged groups. Legal anthropology could thus become a signpost towards a more pluralistic transnational law.

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